No. A-543

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

SAN JOSE UNIFIED SCHOOL DISTRICT, CHARLES KNIGHT, individually and as District Superintendent of the San Jose Unified School District; NEIL H. GEIER, JR., ELIZABETH J. ALLEN, EDWIN P. JONES, JR., MARY K. MCCREATH, and DONALD L. RAIMONDI, individually and as members of the Board of Education of the San Jose Unified School District,
Petitioners,

vs.

ARNULFO M. DIAZ and SOCORRO DIAZ, as the parents and next friends of FERNANDO DIAZ, MIQUEL A. DIAZ and JUAN F. DIAZ; JOSE VASQUEZ, as the parent and next friend of DAVID VASQUEZ, individually and on behalf of all other persons similarly situated,
Respondents.

On Certiorari to the United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an inference of unconstitutional segregative intent arises as a matter of law when a local school district makes decisions on the basis of a neutral and even-handed neighborhood school policy that has the foreseeable and foreseen result of maintaining or intensifying existing de facto ethnic imbalance?

2. Whether a local school district that has not in the past operated an unconstitutional dual school system is forbidden as a matter of law from making decisions relating to the location of new schools, the closing of old schools, or the use of mobile classroom units on the basis of a neutral and even-handed neighborhood school policy, when these decisions have the foreseeable and foreseen result of maintaining or intensifying existing de facto ethnic imbalance?

3. Whether the Court below erred in interpreting the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) as not requiring a duty of deference to a trial court's factual finding that a local school district has acted without segregative intent?

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OPINIONS BELOW

This is a petition for a writ of certiorari to issue to review the en banc judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on May 17, 1984, which reversed a decision of the United States District Court for the Northern District of California.

The opinion of the Ninth Circuit, which is reproduced as Appendix ("App.") A at pages A-1 through A-41, is reported at 733 F.2d 660 (9th Cir. 1984).

Two prior opinions of the Ninth Circuit in this proceeding are reported at 612 F.2d 411 (9th Cir. 1979) and 705 F.2d 1129 (9th Cir. 1983) and appear in App. E at pages A-100 through A-109, and in App. C at pages A-43 through A-56, respectively.

The District Court decisions in this matter are reported at 412 F.Supp. 310 (N.D. Cal. 1976) and 518 F.Supp. 622 (N.D. Cal. 1981) and appear in App. F at pages A-110 through A-162, and in App. D at pages A-57 through A-99, respectively.

The November 7, 1984 order of the Ninth Circuit on the petition for a rehearing en banc by the full court is unreported and is reprinted as App. B at page A-42.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 17, 1984. A timely petition for rehearing en banc by the full court was denied on November 7, 1984. App. B, A-42. An order extending time to file a petition for writ of certiorari until March 7, 1985, was granted by this Court on January 17, 1985. App. H at A-164.

This petition for certiorari was filed within the March 7, 1985, deadline.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOKED

U.S. Const. amend. XIV, § 1, provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The litigation giving rise to this petition for certiorari began in 1971, when respondents brought suit in the United States District Court for the Northern District of California alleging that the schools of the San Jose Unified School District were unconstitutionally segregated on the basis of ethnicity.

A. THE BACKGROUND OF THE LITIGATION

The San Jose Unified School District ("District") is shaped like a slender, elongated crescent. It is approximately 16 air miles in length, and varies from a maximum of four to a minimum of one and one-half air miles in

width.[1] The northern half of the district encompasses downtown San Jose, while the southern half stretches into areas that are primarily suburban. *Diaz v. San Jose Unified School* ("Diaz I"), App. F, A-115. Between 1950 and 1970, student enrollment in the District increased by over 250%.[2] Virtually all of the increase in school age population occurred in the southern section of the District, where there has been an explosion of new suburban subdivisions. *Diaz v. San Jose Unified School District* ("*Diaz* III"), App. D, A-70.

The Hispanic or Spanish-surnamed population of the District is primarily concentrated in the District's northern, downtown sections; the southern suburban areas are primarily Anglo. Because of the peculiar shape and demography of the District, it represents a unique and extreme case of de facto ethnic separation. The District can be bisected with a line, north of which the student population is 60.5% Hispanic, south of which it is only .07% Hispanic.[3] There is no dispute that the vast majority of the District's schools are racially imbalanced.[4]

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[1]*Diaz v. San Jose Unified School District* (*Diaz* V), App. A, A-2. A map of the District may be found at App. G, A-163.

[2]*Diaz* I, App. F. A-116. In 1973, there were 36,687 students enrolled in the District. *Ibid.*

[3]*Diaz* III, App. F. A-69. Spanish-surnamed Americans are the only substantial minority in the District. *Diaz* I, App. E, A-114, A-116-117.

[4]At the time of the underlying litigation, the guidelines of the State of California defined as racially imbalanced any school in which a percentage of pupils of one or more ethnic groups differs by more than 15 percentage points from the percentage of that ethnic group in the total student population of the district. *Diaz* III, App. D, A-70. By that criterion, 41 out of 50 schools in the District were racially imbalanced in 1968.

B. THE PROCEEDINGS BELOW

In 1971 respondents commenced an action in federal district court on behalf of themselves and the class of all Spanish-surnamed students enrolled in the District and their parents, alleging that the District, its Superintendent, and the members of its Board of Education ("Board") had intentionally and purposefully operated and maintained a segregated public school system in violation of the Fourteenth Amendment to the United States Constitution.[5] The defendants in that action, who are now petitioners before this Court, admitted that its schools were racially imbalanced, but contended that the imbalance was due solely to its adherence to a neutral neighborhood schools policy, together with the District's unique demographic and residential patterns.

A trial was held on the merits, and in 1976 the District Court, per Judge Robert F. Peckham, found that "defendants . . . have never acted with segregative intent." *Diaz* I, App. F, A-161. The Court understood that its obligation was "to scrutinize closely the school board decision-making process to assure that false or facile justifications do not mask purposeful discrimination." *Id.* at A-151. It found that although petitioners had made decisions which maintained or did not ameliorate existing racial imbalance, these decisions were justified by a consistent and neutral adherence to a "neighborhood school policy"[6] that located

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[5]There were no pendent state claims. *Diaz v. San Jose Unified School District* (*Diaz* IV), App. C, A-51; *Diaz* III, App. D, A-94.

[6]*Id.* at A-158-161. The Court found no evidence of "attempts to gerrymander attendance boundaries or otherwise manipulate attendance areas to lock in minorities or freeze segregated school patterns." *Diaz* I, App. F. A-158. Respondents "produced no evidence of state-approved restrictive covenants, discriminatory zoning, or other racially-motivated state action shaping the demographic and ethnic makeup of the San Jose Unified School District." *Id.* at A-161.

"schools where [there were] children, so that students live 'within walking distance of the school.'" *Id.* at A-141. The Court held that in the absence of a prior constitutional violation, petitioners were under no "affirmative duty to improve ethnic balance,"[7] and hence that petitioners could in good faith "pursue other educational goals over improved ethnic balance." *Id.* at A-158. Judgment was accordingly entered for petitioners.

On appeal, a divided panel of the Ninth Circuit vacated the judgment and remanded the case in light of *Columbus Board of Education v. Penick* ("*Columbus*"), 443 U.S. 449 (1979), and *Dayton Board of Education v. Brinkman* ("*Dayton* II"), 443 U.S. 526 (1979). *Diaz v. San Jose Unified School District* ("*Diaz* II"), App. E, A-100. The Court of Appeals held that an "inference of segregative intent arose from [respondents'] proof," and that evidence of a consistent adherence to a "long established policy of neighborhood schools" could be "of slight relevancy or none at all" in rebutting this inference. *Id.* at A-105-107. In particular, the Court held that decisions to open or close schools could not "be justified by neighborhood school policies." *Ibid.*

On remand the District Court, per Judge Peckham, took as guidance this Court's holding in *Dayton* II that although "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose," such proof did not constitute "a prima facie case of purposeful racial discrimination" and did not "routinely shift[] the burden of persuasion to the defendants."[8] The District Court adopted the following constitutional standard:

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[7] *Diaz* I, App. F, A-152. No statutorily mandated "dual system" of segregated schools has ever existed in the District. *Diaz v. San Jose Unified School District* (*Diaz* II), App. E. A-100, A-101.

[8] *Diaz* III, App. D, A-60; *Dayton* II, at 536 n.9.

> The inevitability and foreseeability of racial imbalance resulting from official decisions is relevant evidence to be weighed, but it is not probative without further examination of the context of, and other evidence concerning, the actions and decisions of the officials. Inferences to be drawn from the effects of decisions must be supported by the other evidence, or there can be no finding of liability. Otherwise, the court would be holding the state officials responsible for the consequences of their decisions, rather than holding them responsible only when the court is convinced that the decisions were at least in part motivated by an improper intent or purpose. *Diaz* III, App. D, A-64-65.

Judge Peckham held that the District's adoption of a neighborhood school policy was itself motivated by a "sincere belief in its beneficial effects on the educational process and not in order to use such a policy to perpetuate segregation."[9] There was no "evidence of manipulation or bad faith in the adoption and maintenance" of the policy. *Diaz* III, App. D, A-97. Furthermore, since the objective of the neighborhood school policy was to minimize the distance between schools and the children enrolled in them, *Diaz* I, App. F, A-141, the District Court held that decisions to construct new schools "where there is a rapid increase in school age population" *Diaz* III, App. D, A-70, and to close old schools in areas of "declining enrollment" *id.* at A-74-79, were in effect, consequences of and justified by the policy.

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[9] *Id.* at A-96. The Court held that "the evidence does not suggest that the past acts of the school board have contributed significantly to the residential segregation of the attendance areas. If such had been the case, there might have been grounds for holding that the present assertion of a neighborhood school policy was designed to perpetuate segregated schools." *Ibid.*

In reaching its conclusion, the District Court carefully reviewed each school district decision which allegedly evidenced discriminatory purpose, and found that in each case the decision was made in order to serve neutral and reasonable educational goals. It therefore held that petitioners had not acted with segregative intent and entered a judgment on their behalf.

A divided panel of the Ninth Circuit affirmed the judgment, noting that the trial court had "in each instance" found "reasonable and rational explanations for" decisions having the foreseeable effect of maintaining or not ameliorating racial imbalance. *Diaz v. San Jose Unified School District* ("*Diaz* IV"), App. C, A-46. The panel held that the trial court had articulated "adequate bases . . . for all of its findings of fact." *Ibid.*

On rehearing en banc, the Ninth Circuit reversed, holding that although the trial court had "made comprehensive and accurate findings covering the significant historical facts," *Diaz v. San Jose Unified School District* ("*Diaz* V"), App. A, A-6, its "finding that the defendants acted without segregative intent was clearly erroneous."[10] *See* Fed. R. Civ. P. 52(a). The Ninth Circuit held that "where, as here, the adverse consequences [of racial imbalance] are clearly identified and repeatedly articulated to the decision-making body, the inevitability of the adverse effects provide a strong inference of illegitimate intent." *Diaz* V, App. A, A-4 n.1. This inference could not be rebutted by adherence to a neighborhood school policy, since "the location and construction of new schools and the closing of old schools are not merely decisions enforcing a neighboorhood school

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[10] *Diaz* V, App. A, A-1. The en banc Court consisted of 11 of the Ninth Circuit's 24 active judges. Judge Fletcher authored the opinion for the Court; Judges Choy, Wallace and Sneed dissented.

policy." *Id.* at A-7. Reviewing various decisions that had the effect of maintaining or intensifying racial imbalance, including the District's refusal to use busing to achieve integration, the Court ruled that "[a]n inescapable conclusion that the Board intended segregation emerges from a view of the evidence as a whole." *Id.* at A-30.

A petition for rehearing was denied on November 7, 1984. App. B, A-42.

REASONS FOR GRANTING THE WRIT

The concept of neighborhood education is deeply embedded in the practices of American schooling.[11] This is true in part because neighborhood schools have obvious advantages in terms of transportation, safety, convenience and administration. *Diaz* I, App. F, A-161. The paramount importance of neighborhood education, however, is that it reflects "the deeply felt desire of citizens for a sense of community in their public education." *Keyes v. School District No. 1*, 413 U.S. 189, 246 (1973) (Powell, J., concurring). Nevertheless, in the many contemporary metropolitan areas where de facto ethnic or racial separation exists, even-handed application of a neighborhood school policy will have the foreseeable result of producing schools that are racially imbalanced. This is true in the San Jose Unified School District.

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[11] "The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration." *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 60 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967). The present policy of the United States is that "the neighborhood is the appropriate basis for determining public school assignments." *See* 20 U.S.C. § 1701(a)(2).

The issues raised by this case are of national importance. If permitted to stand, the legal principles enunciated in the en banc opinion of the Ninth Circuit will effectively preclude metropolitan school districts like San Jose, which have never engaged in de jure segregation, from implementing a neutral neighborhood school policy and deriving the benefits traditionally attributed to it.

The opinion below rests on legal principles which are directly contrary to the constitutional guidelines set forth by this Court in *Columbus* and *Dayton* II, and which conflict with the holdings of other federal courts of appeals.

In addition, the en banc opinion of the Ninth Circuit did not interpret and apply the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) as including a duty of deference to the findings of fact of a trial court. This misinterpretation of Rule 52(a) is in conflict with the decisions of other federal courts of appeals, and, if permitted to stand, will significantly impair the orderly relationship between trial and appellate courts in the sensitive and important area of school desegregation.

I

THE DECISION BELOW IS CONTRARY TO THE HOLDINGS OF THIS COURT

The question before the trial court was whether petitioners' actions, which had the effect of perpetuating racial imbalance but which were on their face racially neutral, were motivated by segregative intent. All agree that "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose." *Dayton* II, at 536 n.9. The issue is whether proof of such foreseeability, standing alone, is sufficient to constitute a prima facie case of the segregative intent necessary to establish a constitutional violation.

In *Dayton* II, this Court specifically rejected such a position, stating:

> We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants. 443 U.S. at 536 n.9.

The Ninth Circuit, however, held that although "[p]roof that the segregative effects of a decision were foreseeable is not to be taken, as a general proposition, to make out a *prima facie* case of segregative intent," nevertheless "where, as here, the adverse consequences are clearly identified and repeatedly articulated to the decision-making body, the inevitability of the adverse effects provide a strong inference of illegitimate intent." *Diaz* V, App. A, A-4.

In plain English, the Ninth Circuit held that although foreseeable adverse consequences do not constitute a prima facie case of unconstitutional discrimination, adverse consequences that are in fact foreseen do constitute such a case. This legal principle, however, is merely an evasion of this Court's holding in *Dayton* II, since in most circumstances a reasonably competent school board will be well aware of the adverse consequences of its decisions. For example many school districts, like San Jose, face the "familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city" *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 25 (1971). In such circumstances neutral application of a neighborhood school policy will have the foreseeable and foreseen effect of reflecting any de facto residential ethnic imbalance found within the school dis-

trict's boundaries. If the opinion of the Ninth Circuit is permitted to stand, it will effectively preclude the operation of a neutral neighborhood school policy in such metropolitan areas.

The Ninth Circuit's standard for finding segregative intent confuses the prima facie elements of a case of segregative intent with the elements of a violation of the affirmative duty incurred by a school district that has been shown in the past to have engaged in unconstitutional segregation. This Court, however, has sharply distinguished between these elements.

The "measure" of the affirmative duty to remedy the effects of a past constitutional violation is "the effectiveness, not the purpose, of . . . actions in decreasing or increasing the segregation caused by the dual system," *Dayton* II, 443 U.S. at 538, and for this reason violations of the duty can be established by proof that a school board has taken actions knowing that they will maintain or increase segregation. *See Dayton* II, 443 U.S. at 536 n.9. But under *Dayton* II such proof, standing alone, cannot provide a sufficient basis to support a finding of segregative intent.

The Ninth Circuit, however, supported its inference of segregative intent on the basis of its interpretation of this Court's opinion in *Columbus*. *Columbus* was read to permit a finding of segregative intent where a school board's actions have foreseeably segregative consequences, and where "the school board ha[s] been warned about the segregative consequences of its actions." *Diaz* V, App. A, A-29 n.19. *See also id.* at A-28-29 n.18. But the Ninth Circuit's interpretation of *Columbus* is profoundly at odds with *Dayton* II and is simply incorrect.

The language relied upon by the Ninth Circuit concerned the fact that " 'the *Columbus* defendants . . . were adequately put on notice of the fact that action was required

to correct and to prevent the increase in' segregation, yet failed to heed their duty to alleviate racial separation in the schools." *Columbus,* 443 U.S. at 463. It thus pertained to the "affirmative duty" of the *Columbus* defendants to remedy their prior constitutional violations by dismantling their "dual school system." *Id.* at 458-59. It did not concern the elements of a prima facie case of segregative intent.

The Ninth Circuit's confusion between the obligations of an affirmative duty to disestablish a dual school system and the legal prerequisites imposed by this Court for a finding of segregative intent is further illustrated by the Ninth Circuit's repeated references to petitioners' rejection of alternative courses of action that would have had less segregative effect than actions actually taken. For example in summarizing the essence of its holding that petitioners had acted with segregative intent, the Ninth Circuit said:

> The pattern of Board choices that consistently maintained or intensified segregation is apparent. Although many of the available alternatives would have presented an incomplete solution, each would have contributed incrementally toward reducing ethnic imbalance. In almost every instance, the Board chose to "turn toward segregation" rather than away from it. *Columbus,* 443 U.S. at 463 n.12.

Diaz V, App. A, A-30-31. *See also Diaz* V, App. A, A-8-10, A-12-13, A-19-21, A-28-29 n. 18, A-29 n.19.

The Ninth Circuit in effect drew an inference of segregative intent on the basis of petitioners' failure to choose those courses of action that would have had the least segregative impact. This inference imposed on petitioners the affirmative duty always to act so as to produce the least segregative impact, and to subordinate other educational goals to the overriding objective of reducing de facto ethnic imbalance. This duty was imposed on the San

Jose Unified School District even though it had never been established that it had engaged in purposeful segregation.

The Ninth Circuit justified imposing this affirmative duty on the basis of its reading of *Columbus*, which it once again misinterpreted. The Ninth Circuit relied upon a passage in *Columbus* in which this Court was discussing the affirmative duty to remedy the effects of a prior constitutional violation, rather than the elements of a prima facie case of segregative intent. The duty to disestablish a dual school system may well include the affirmative obligation to choose the course of action that has the least segregative consequences. But since petitioners' have never been shown to have established a dual school system, they are under no such obligation. Indeed, this Court has specifically refused to create such an affirmative obligation. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). It follows that petitioners cannot be bootstrapped into such an obligation by transforming the failure to choose the least segregative option into a prima facie case of segregative intent.

It is of great importance to maintain the distinction between the prima facie elements of a case of segregative intent, and the elements of a violation of the affirmative duty to disestablish a dual school system. In the many metropolitan school districts faced with de facto racial or ethnic imbalance, busing to create integration will always remain an "available" alternative that has less segregative consequences. If the opinion of the Ninth Circuit is permitted to stand, neutral neighborhood education will be rendered constitutionally impermissible in such districts.

II

THE DECISION BELOW WILL CONSTITUTIONALLY PROHIBIT THE OPERATION OF NEIGHBORHOOD SCHOOLS IN MANY METROPOLITAN AREAS

The situation is of course different if a school deliberately takes action knowing that it will maintain or intensify

ethnic imbalance and such action can "not 'reasonably be explained without reference to racial concerns.' "[12] *Columbus,* 443 U.S. at 461. *See Clients' Council v. Pierce,* 711 F.2d 1406, 1409 (8th Cir. 1983). In this regard, however, this Court has indicated that the neutral application of a neighborhood school policy can provide constitutional justification even for decisions that have the foreseeable effect of maintaining or intensifying ethnic imbalance. *Crawford v. Board of Education,* 458 U.S. 527, 537 n.15 (1982); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. at 28, 31-32.

The Ninth Circuit conceded that petitioners have, "with few exceptions, adhered to [a neighborhood school] policy rigidly and refused to allow voluntary transfers for any purpose . . . ." *Diaz* V, App. A, A-6. But the Ninth Circuit ignored the implications of this concession by arbitrarily circumscribing the kinds of decisions that a neighborhood school policy can justify. With little factual, legal or policy justification, the Ninth Circuit held that a neighborhood school policy cannot provide constitutional justification for decisions regarding "the location and construction of new schools," the "closing of old schools," or the "use of portable classrooms," *Diaz* V, App. A, A-7-10.

The Ninth Circuit's holding rests upon a profound and deeply disturbing misapprehension of the definition and

[12]Thus the Fifth Circuit has concluded that:

> [i]f the acts alleged to be violative of the Constitution "have been motivated by racially and ethically bona fide concerns . . . and no showing is made that those concerns were actually subordinate to, or a subterfuge for, unconstitutional discrimination," then the fact that a particular act has a natural foreseeable disproportionate racial impact is insufficient to support a finding of discriminatory intent. . . . If, on the other hand, the challenged acts "do not have a firm basis in well accepted and historically sound non-discriminatory social policy, discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences". *United States v. Texas Education Agency,* 600 F.2d 518, 528-29 (5th Cir. 1979).

application of a neighborhood school policy. The Ninth Circuit essentially held, as a matter of law, that the import of a neighborhood school policy is simply that students be required "to attend school within neighborhood attendance areas." *Diaz* V, App. A, A-7. This definition is arbitrary and wooden, and strips neighborhood education of all functional significance. In fact petitioners, like most school districts, meant something quite different by a neighborhood school policy. As the District Court found, the policy was defined with reference to the objective of serving "as many children in such a way that as many of them as possible could walk to school." *Diaz* I, App. F, A-141.

Once the neighborhood school policy is defined in this manner, it has immediate and obvious implications for decisions involving school construction, school closings, or the use of portable classrooms. It implies, for example, that school sitings must be maintained in such a manner as to minimize the distance between schools and where children reside. Thus new schools should be constructed, as the District Court found that they were, where there was "a rapid increase in school age population."[13] *Diaz* III, App. D, A-10. Since this increase occurred in the southern, suburban, Anglo sections of the District, it was unavoidable that each of nine schools constructed by the District between 1965 and 1968 opened as racially imbalanced. *See Diaz* V, App. A, A-14. The District Court found that this result, although foreseeable and foreseen, would not support an inference of segregative intent because "[i]n erecting

[13]The District Court found:

> While it is true that suspicions would be properly aroused if the district was closing schools that appeared to be becoming racially mixed and simultaneously opening new schools farthest from the area where the majority group resides, . . . (Citation omitted), there is no evidence of such manipulation in this case. Rather, the district simply responded to the needs presented by population growth. These new areas were so far from the downtown areas, and the new construction repre-

schools where the students were located, the school board followed its neighborhood school policy." *Diaz* I, App. F, A-151. However, the Ninth Circuit, with its arbitrary definition of a neighborhood school policy, viewed the foreseeable impact of the District's school construction policy as without constitutional justification and hence indicative of segregative intent. *See e.g., Diaz* V, App. A, A-8-13.

Similarly, a neighborhood school policy, if properly defined, implies that schools should be closed, as the District Court found that they were, where there were areas of declining enrollment.[14] *See Diaz* III, App. D, A-75. It so happened that student enrollment declined principally in the northern, downtown, Hispanic areas of the District, and for that reason it was foreseeable and foreseen that school closings would "maintain ethnic imbalance." *Diaz* V, App. A, A-15. The Ninth Circuit, with its myopic view of neighborhood education, construed this fact as supporting an inference of segregative intent, despite the findings of the District Court that each time a school was closed, the attendance area of the closed school was combined with "contiguous" areas "which approximated as closely as possible the concept of a neighborhood school," and that in each instance "the students of the closed school ended up in a new school which was less imbalanced than their old school." *Diaz* III, App. D, A-75.

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sented such a small percentage of the total facilities in the district, that the need for new schools did not present a very good opportunity by itself to help integrate the district. *Diaz* III, App. D, A-70-71.

[14]The District Court found that there was no evidence "that the choice of schools to close was motivated by any segregative intent. In fact, the decision to close the Wilson School and disperse its students to three neighboring schools seems to have been motivated, at least in part, by a desire to eliminate the most heavily segregated Junior High School." *Diaz* III, App. D, A-76.

The District closed 16 schools because of the legal requirements of the Field Act, Cal.Educ.Code §§ 39140 et seq. and 81130 et seq.

The inadequacy of the legal standard set forth by the Ninth Circuit can most clearly be seen in its treatment of portable classrooms. The Ninth Circuit concluded that an inference of segregative intent arose from the fact that petitioners "never used portables to improve ethnic imbalance" and "rejected numerous suggestions for portable siting to alter attendance patterns involving transferring Hispanic students from northern schools to schools further south." *Diaz* V, App. A, A-20. Yet this conclusion follows only if the District's neighborhood school policy is legally defined to be irrelevant to the use of portable classrooms,[15] since the District Court found that "the school board has used mobile units in accordance with its neighborhood school policy, to allow students to remain in their residential attendance area."[16] *Diaz* I, App. F, A-153-54.

(West 1978) which provides minimum standards for public schools to withstand earthquakes. These closings were not dictated by declining enrollment, and are discussed *infra* at p. 18.

[15]It would of course have been improper to infer segregative intent merely from petitioners' failure to use portable classrooms so as to reduce ethnic imbalance to the greatest possible extent. Such an inference would place petitioners under an affirmative duty to ameliorate de facto ethnic imbalance, and would blur the careful distinction created by this Court between de jure and de facto segregation. *See* Section I, *supra.*

[16]The District Court found:

> [T]he school district could always have opted to place new portables at the other end of the district from the area of overcrowding, and then bus the students to that end of town. But to suggest that the failure to take that extreme action indicates segregative intent seems unreasonable to this court. . . . [T]he need for portables at a particular location at either end of town was considered temporary—in the north until the new Field Act schools were constructed, in the south until bond issues were passed by the voters to build new schools to handle the growth in population. . . . [T]he decision to maintain neighborhood schools while new schools were being built, rather than sending the students temporarily across town, for dis-

As can be seen from these examples, the effect of the Ninth Circuit's opinion is to significantly undermine neighborhood education as a legitimate educational goal. Decisions relating to school construction, school closings, and the use of portable classrooms are integral to the maintenance and administration of a neighborhood school policy. Yet the Ninth Circuit's opinion prohibits school districts from relying on a neighborhood school policy to justify these decisions, leaving these decisions naked and without constitutional or educational justification. This is contrary to the holdings of other circuit courts. *See Alexander v. Youngstown Board of Education*, 675 F.2d 787, 798 (6th Cir. 1982) (school construction); *Davis v. Board of Education*, 674 F.2d 684, 688 (8th Cir. 1982) *cert. denied*, 459 U.S. 881 (1982) (school closing). If the Ninth Circuit opinion is permitted to stand, it will effectively result in the demise of the traditional neighborhood school system in the many metropolitan districts faced with de facto ethnic or racial separation.[17]

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tances which would have to be, for the most part, fairly substantial, seems to this court to be perfectly explicable for racially neutral reasons. . . . *Diaz* III, App. D, A-80-81.

[17]The Ninth Circuit further undermined the possibility of neighborhood education by holding that petitioners' use of busing within neighborhood attendance areas created an inference of segregative intent with respect to the petitioners' refusal to use cross-town busing in order to achieve integration. *Diaz* V, App. A, A-18, 29. The District Court found that although "approximately one-third" of the District's students were bused within attendance areas,

> except for transportation to special schools and programs, there was no evidence that there is or has ever been any busing outside of the attendance areas, which have not been shown to have been established or gerrymandered in any way that suggests segregative intent. Nor was there any evidence

III

THE OPINION BELOW MISINTERPRETED THE "CLEARLY ERRONEOUS" RULE OF FED. R. CIV. P. 52(a) IN SUCH A MANNER AS TO IMPAIR SIGNIFICANTLY THE ORDERLY RELATIONSHIP BETWEEN TRIAL AND APPELLATE COURTS IN THE IMPORTANT AND SENSITIVE AREA OF SCHOOL DESEGREGATION

The District Court's conclusion that petitioners had acted without segregative intent was a finding of fact, and under

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introduced showing that students could have been bussed equivalent distances to a more integrative setting. . . . There is no evidence . . . suggesting that the school officials . . . did not strive for the best approximation of the "walking distance" ideal. . . . Nor was there any evidence offered which suggested that the distances from school ever became so great that the underlying benefits deriving from a neighborhood school policy and the decentralization it allows—other than the ability to walk to school—were ever threatened or eliminated. *Diaz* III, App. D, A-82-83.

The Ninth Circuit nevertheless held that "[t]he Board's use of buses for every purpose but integration, coupled with the intransigent resistance to the use of buses for integration supports an inference of segregative intent." *Diaz* V, App. A, A-18. The Ninth Circuit rested its conclusion on *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), which it interpreted to mean that treating busing for purposes of integration differently than busing for other purposes was constitutionally invalid. *Diaz* V, App. A, A-18, A-29. But this is a misreading of *Seattle*, which concerns only the situation where the "political process or the decision making mechanism" for integrative busing has been uniquely altered. 458 U.S. at 485. There was no such improper alteration of the political process in this case. Since financial limitations will render the ideal of "walking distance" merely aspirational in most major metropolitan school districts, the holding of the Ninth Circuit will permit an inference of segregative intent in virtually all such cases, despite the fact that refusal to bus long distances to achieve integration is simply the outgrowth of a legitimate neighborhood school policy.

Fed. R. Civ. P. 52(a) it could be set aside on appeal only if "clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982). The "clearly erroneous" standard of Rule 52(a) is intended to establish an orderly relationship between appellate and trial courts, in which factual findings are made in the first instance by the court most familiar with the evidence, and in which litigants are not rewarded simply because they have the financial resources or perseverance to appeal. *See* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 771, 778-82 (1957). The underlying policies of the "clearly erroneous" standard thus require appellate "deference" to a trial court's findings of fact. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). These findings may not be reversed as plainly erroneous merely because an appellate court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the district court apparently deemed innocent." *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485, 495 (1950).

The "clearly erroneous" standard is of particular importance in the sensitive area of school desegregation. Findings of fact concerning the existence *vel non* of segregative intent entail complex and difficult issues of judgment that involve a "multiplicity of factual elements, with their various combinations," and are ultimately based upon "the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960). Because of the scope and complexity of such findings, appellate courts may easily dilute the deference that should be given to the trial court's determinations. For this reason, appellate review of such findings should be especially "restricted." *Id.* at 290. *See Rogers v. Lodge*, 458 U.S. 613, 622 (1982). Accordingly, courts of appeals have shown "great deference to . . . district court's findings in school desegregation cases," and have refrained from re-

versing findings as plainly erroneous if "there is sufficient evidence to support the findings of the district court." *Goldsboro City Board of Education v. Wayne County Board of Education*, 745 F.2d 324, 327 (4th Cir. 1984). *See Alexander v. Youngstown Board of Education*, 675 F.2d at 796-801.

The dangers of a contrary approach are well illustrated by this case, in which the Ninth Circuit interpreted Rule 52(a) as imposing no requirement of deference toward trial court findings of fact, and as authorizing revision of such findings whenever an appellate court has the "firm conviction that a mistake had been committed."[18] *Diaz* V, App. A, A-6, 31. Analysis of the Ninth Circuit's opinion, however, demonstrates not only the wisdom of Rule 52(a)'s policy of entrusting findings of fact in the first instance to the trial court, but also the importance of requiring appellate deference to these findings.

A. THE OPINION BELOW IGNORED PERTINENT AND SPECIFIC FINDINGS OF THE DISTRICT COURT

This Court has recognized that a determination of discriminatory purpose, entails "a sensitive inquiry into such circumstantial and direct evidence of intent as may be avail-

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[18]The Ninth Circuit's opinion fails to mention any responsibility to defer to a trial court's factual findings. The opinion is instead manifestly predicated on the assumption that an appellate court is empowered to revise such findings if only it has a sufficiently firm belief that the case should be viewed differently. The Ninth Circuit defended this assumption by citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), in which this Court said that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." The "firm conviction" to which this Court referred, however, was never meant to be attained in the absence of a proper deference to trial court findings of fact. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. at 855.

able." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977). This inquiry requires a thorough mastery of the entire record of a case, which in school desegregation cases tends to be rather large and complex.[19] The policy of Rule 52(a) is in part based upon the assumption that since trial courts are more familiar with the record than appellate courts, a court of appeals should be especially careful before reversing a trial court's findings. *See Columbus Board of Education v. Penick*, 443 U.S. 449, 471 (1979) (Stewart, J., concurring). The correctness of this assumption is confirmed by the opinion below, in which the Ninth Circuit repeatedly leapt to conclusions that were either unjustifiable in light of all the evidence, or that were actually negated by specific findings of the District Court.

For example, the Ninth Circuit in its opinion discussed at some length petitioners' closing of certain schools which the Field Act required to be shut down because they were structurally inadequate to meet the stress of an earthquake.[20] In rebuilding these schools the District had chosen to retain original attendance areas, despite the foreseeable result that most of these schools would re-open as ethnically imbalanced, and despite existence of alternatives that would marginally have reduced the imbalance. *Diaz* I, App. F, A-122-24; *Diaz* III, App. D, A-71-72. After examining these facts, the trial court found no evidence of segregative intent, but in its en banc opinion the Ninth Circuit disagreed. *Compare Diaz* III, App. D, A-71-74 *with Diaz* V, App. A, A-122-27.

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[19]In this case the trial lasted 11 days. The trial transcript runs to 1,405 pages, together with some 100 multi-part exhibits which together comprise over 1,600 pages of written material.

[20]*See* note 14 *supra*.

Since it would have been constitutionally improper for the Ninth Circuit to infer segregatve intent merely from the foreseeable results of petitioners' actions, even if these results could have been avoided by available alternatives, the Court of Appeals must have based its conclusion on its perception that there was no legitimate educational justification for petitioners' decisions. But, the trial court in fact had made an important and specific finding regarding the educational justification for the siting of these schools. The trial court had expressly found that petitioners' decisions were responsive to "the demand of local parents," and in particular to the pressure "of the Spanish-surnamed community" which "was concerned that it would lose its neighborhood schools." *Diaz* I, App. F, A-124; *Diaz* III, App. D, A-72-73. This finding was not disturbed on appeal, and it provides a legitimate and powerful educational rationale for petitioners' decisions. The Ninth Circuit's failure to take account of this finding is a disturbing indication of its incomplete grasp of this record, a flaw which might perhaps have been corrected had the Court of Appeals exercised the restraint and deference required by Rule 52(a).[21]

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[21]Another example of the Ninth Circuit's unfamiliarity with the record occurred in its discussion of petitioners' admission at trial that Spanish-surnamed faculty and staff had been intentionally assigned to downtown, Hispanic, schools. The trial court found that although the evidence did not permit such assignments to be justified by reference to a racially neutral policy of assigning Spanish-speaking faculty and staff (whether Hispanic or Anglo) to schools with a disproportionate number of Hispanic students, the assignments were in fact motivated by the "benign purposes" of "providing role models for the students," and hence that the assignments could not be used "as support for inferring segregative intent from any of the school officials' other acts which had the foreseeable effect of perpetuating racial imbalance in the schools." *Diaz* III, App. D, A 92-93. The Ninth Circuit took a different view, holding that there was an "inference of racial bias" because the "Board

B. THE OPINION BELOW DID NOT DEFER TO THE FINDINGS OF THE DISTRICT COURT AS REQUIRED BY RULE 52(a)

The Ninth Circuit recognized that the trial court had made "comprehensive and accurate findings covering the significant historical facts." *Diaz* V, App. A, A-6. In holding that petitioners' had acted with segregative intent, however, the Ninth Circuit simply chose to give these historical facts "a more sinister cast" than had the District Court and by so doing violated the principal of deference which is at the core of Rule 52(a).[22] *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. at 855; *Columbus Board of Education v. Penick*, 443 U.S. at 468 (Burger, C.J., concurring); *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123 (1969). The Ninth Circuit's approach was thus to ask whether, in the first instance, "it would have made the findings the trial court did." *Zenith Corp. v. Hazeltine*, 395 U.S. at 123.

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assigned faculty and staff on the basis of ethnic origin without any plausible neutral justification." *Diaz* V, App. A, A-19-20, A-30. In reaching this conclusion, however, the Ninth Circuit simply overlooked the trial court's specific finding, made after the opportunity to observe at first hand the demeanor and testimony of petitioners' witnesses, that petitioners' assignments were motivated by "benign purposes." The Ninth Circuit's application of the "plainly erroneous" standard was thus deeply flawed by an inadequate comprehension of the record.

[22]The Ninth Circuit's refusal to defer to the findings of the trial court is particularly unjustified in this case. It is not as if the Ninth Circuit had any reason to believe that Chief Judge Peckham was incapable of perceiving "sinister" motives where they exist, or that he was inexperienced, or naive, or reluctant to make findings of segregative intent. *See, e.g., Larry P. v. Riles*, 495 F. Supp. 926, 932-33, 975-86 (N.D. Cal. 1979); *EEOC v. Pacific Southwest Airlines*, 587 F. Supp. 686 (N.D. Cal. 1984); *Officers for Justice v. Civil Service Commission*, 20 F.E.P. Cases 1304, 1305 n.1 (N.D. Cal. 1977).

A striking example of this lack of deference occurred in the Ninth Circuit's discussion of certain statements made by the District's Board of Education during an election on a proposed bond issue designed to finance the construction of schools to replace those which the Field Act required to be closed.[23] These schools were located in the northern, Hispanic areas of the District. During the elections, the Board made statements which the Ninth Circuit interpreted to mean that "if the public did not vote for the bond issue, busing would result. If it did vote for the issue, no busing would result." *Diaz* V, App. A, A-27. The District Court found that these statements were "simply realistic factual statements of the results which would flow from the failure of the bond issues to pass," and that they therefore did not constitute evidence of segregative intent.[24] *Diaz* III, App. D, A-87-88. The Ninth Circuit found this conclusion to be plainly erroneous, holding that the statements "compel an inference of segregative intent." *Diaz* V, App. A, A-28. Perhaps these differing conclusions can be explained by the fact that the trial court was aware, as the Ninth Circuit evidently was not, that the District's neighborhood school policy had support in both the Anglo *and* Hispanic communities[25] and that it was thus overly simplistic to interpret petitioners' appeal to preserve neighborhood education as simply catering "to a pro-segregation public." *Diaz* V, App. A, A-27. But regardless of the ultimate accuracy of the District Court's finding, it is clear that the Ninth Circuit gave it no deference, and found it to be plainly erroneous only because it chose to give a "more sinister cast to actions which the district court

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[23] *Diaz* I, App. F, A-154-55; *see* note 14 *supra*.

[24] The District Court found that there was "no particular emphasis given to" these statements, and that "in context" there was no "suggestion that the school board meant to do anything but point to the many burdens which would be placed on the students and the district in general by such a failure. . . ." *Diaz* III, App. D, A-88.

[25] *See* Section III (A), *supra*.

. . . deemed innocent." *United States v. National Ass'n of Real Estate Boards,* 339 U.S. at 495.

Another example of this improper application of the "plainly erroneous" standard concerns the trial court's finding that petitioners' failure to comply with their affirmative duty under California law to integrate was not "evidence of segregative intent." *Diaz* I, App. F, A-158. The Ninth Circuit disagreed, holding that petitioners' failure suggests that, they were "motivated, at least in part, by a desire to avoid desegregation rather than a sincere commitment to the educational benefits of neighborhood schools." *Diaz* V, App. A, A-13. As a matter of logic, of course, petitioners' refusal to comply with their affirmative duty could stem *either* from a bona-fide, but perhaps unduly "stubborn adherence" to the virtues of neighborhood education, *Diaz* V, App. A, A-13 *or* from segregative intent. The Ninth Circuit chose to find the latter; the District Court, closer to the facts of the case and able to observe at first hand the demeanor and "evaluate the credibility" of petitioners' witnesses, chose to find the former. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. at 855. The point, however, is that the Ninth Circuit gave no deference to the District Court's determination, choosing instead to arrogate to itself the power to "substitute its interpretation of the evidence for that of the trial court." *Id.* at 857.

In the end, therefore, the Ninth Circuit's lack of deference to the District Court rewarded respondents for persistently prosecuting their appeal until they encountered judges who shared their view of the case. That is not a recipe for an orderly relationship between trial and appellate courts, for it communicates to litigants that there is nothing presumptively correct about a trial court's findings of fact. It is in essence an invitation to litigants to appeal, and to keep appealing until their (or their opponents') resources

are exhausted. The standard of the Ninth Circuit, if permitted to stand, will have the most unfortunate consequences in the sensitive and important area of school desegregation, for it will turn these cases into political footballs, to be kicked from trial to appellate courts and back again.

CONCLUSION

The issues posed by this case are of great importance; they are well-focused and cleanly presented. For the reasons stated in this petition, petitioners respectfully request that a writ of certiorari issue to review and ultimately to reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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